PATEL HOLDING SDN. BHD.

v.

ESTET PEKEBUN KECIL SDN. BHD. & ANOR.

HIGH COURT MALAYA, PENANG
WAN ADNAN J
[CIVIL SUIT NO. 22-36-89]
2 JANUARY 1990

CIVIL PROCEDURE: *Action by plaintiff - Defendants filed defence and counterclaim - Plaintiff's failure to file defence to the counterclaim - Judgment entered against plaintiffs - Notice of demand - Section 218 Companies Act 1965 - Whether judgment regularly obtained - Plaintiffs granted injunction restraining defendants from presenting winding-up order - Application to set aside injunction - Disputed debt - Abuse of process of the Court.*

The plaintiffs commenced an action against the 1st defendant and the 2nd defendant bank. The first defendant filed a defence and a counterclaim against the plaintiffs. The plaintiffs did not file their defence to the counterclaim and consequently judgment was entered against the plaintiffs. The defendants served a demand under s. 218 of the Companies Act 1965 on the plaintiffs.

The plaintiffs contended that the debt claimed by the 1st defendant was a disputed debt and secondly that the 1st defendant's sole contention in issuing the s. 218 demand was merely to put pressure on the plaintiffs, which the plaintiffs claimed was an abuse of the process of Court.

The plaintiffs applied and were granted an injunction restraining the 1st defendant from presenting a winding-up petition and from advertising or causing to advertise such petition or other proceedings with such petition.

This was an application by the 1st defendant to set aside the injunction granted *ex parte.*

Held:

[1] The judgment obtained by the defendants was a regular judgment and remained regular and enforceable until it is set aside. Until the judgment is set aside the claim by the 1st defendant based on the judgment cannot be regarded as a disputed debt since it is in fact an enforceable judgment debt.

[2] In this case, as the judgment is regular and enforceable, the 1st defendant should not be prevented from presenting the petition to wind-up the plaintiffs.

[3] There is no evidence to support the contention of the plaintiffs that the sole purpose of the 1st defendant's action was to put pressure on them. The 1st defendant is merely doing what it has the right to do having obtained a judgment against the plaintiffs which judgment has not been stayed.

[Injunction obtained by plaintiffs set aside. Plaintiff to pay damages occasioned by this injunction.]

Case referred to:

Chip Yew Brick Works Sdn. Bhd. v. Chang Heer Enterprise Sdn. Bhd. [1988] 1 CLJ (Rep) 5

Legislation referred to:

Companies Act 1965, s. 218

For the applicant/first defendant - Kanawagi; M/s. Khana & Co.
For the respondent/plaintiffs - V.M. Mohan; M/s. V.M. Mohan & Co.

JUDGMENT

Wan Adnan J:

(Enclosure 59)

This is an application by the first defendant to set aside the injunction granted *ex parte* on 26 June 1989. By the order the first defendant was restrained from presenting to the Court or any other Court a petition to wind up the plaintiffs and from advertising or causing to advertise such petition or other proceedings with such petition.

The plaintiffs had commenced this action against the first defendant and Malayan Banking Bhd., as the second defendant. The first defendant had filed a defence and a counterclaim against the plaintiffs. It was filed on 9 November 1988. The plaintiffs' solicitors had requested for time to file their clients' defence to the counterclaim. The first defendant's solicitors had granted the plaintiffs a total of 79 days for the plaintiffs to file their defence. No defence was filed. Consequently judgment was entered against the plaintiffs. Based on the judgment a demand under s. 218 of the Companies Act 1965 dated 8 June 1989 was served on the plaintiffs.

The plaintiffs contend that the debt claimed by the first defendant is a disputed debt. Secondly it is their contention that the first defendant's sole intention in issuing the notice of demand under s. 218 of the Act was really for the purpose of putting pressure on the plaintiffs which is an abuse of the process of the Court.

In my view the judgment had been regularly obtained. A judgment remains regular and enforceable until it is set aside by the Court. Although the plaintiffs had filed an application to set aside the judgment, the judgment remains regular and enforceable until it is set aside. Until the judgment is set aside the claim by the first defendant based on the judgment cannot be regarded as a disputed debt. It is in fact an enforceable judgment debt.

In the Supreme Court case of *Chip Yew Bricks Sdn. Bhd. v. Chang Heer Enterprise Sdn. Bhd.* [1988] 1 CLJ (Rep) 5, the appellant had served on the respondent a notice under s. 218 of the Companies Act demanding for RM127,159 which was the costs of the bricks supplied. The respondent did not pay any part of the amount claimed. The respondent had admitted being indebted only for the sum of RM60,580. Eventually the appellant filed a petition for winding up. On the application of the respondent the High Court granted an injunction restraining the appellant from advertising the petition.

The Supreme Court set aside the injunction. In that case no judgment had been obtained by the appellant.

> In our judgment as the debt of RM60,500 is not disputed the respondent company is caught under s. 218(2)(a) as having neglected to pay it and is deemed to be unable to pay its debt ... Therefore the appellant should not be prevented from pursuing its petition so that the Court would be able to consider all evidence and determine whether it should exercise its discretion to order winding up or not to order it.

per Wan Hamzah SCJ (as he then was) delivering the judgment on behalf of the Supreme Court.

Here in the present case there is a regular and enforceable judgment against the plaintiffs. The first defendant should not be prevented from presenting the petition to wind up the plaintiffs.

As regards the plaintiffs' second contention that the first defendant's action was for the sole purpose of applying pressure, all I need say is that I do not find any evidence to support the contention. The first defendant is merely doing what it has the right to do having obtained a judgment against the plaintiffs which judgment has not been stayed.

For the above reasons I set aside the injunction with costs and ordered the plaintiffs to pay any damage suffered by the first defendant occasioned by the injunction.

Also found at [1990] 2 CLJ 280